Terusan Waja Sdn Bhd v The Owner(s) of The Ship MV Borneo 1

HIGH COURT (MIRI) — ADMIRALTY IN REM NO MR-27–3 OF 2011
STEPHEN CHUNG J
31 MAY 2012

Contract — Breach — Agreement — Agreement to carry out overhaul works on defendant's vessel — Failure to pay outstanding charges — Whether defects encountered by vessel were due to substandard work of plaintiff — Whether proven that losses incurred due to off hire of vessel were due to substandard work of plaintiff and were reasonably foreseeable — Counterclaim — Whether proven

The owner of the vessel called the MV Borneo 1 ('the defendant') had appointed the plaintiff to carry out certain overhaul works on the vessel. There was no written contract entered into between the plaintiff and the defendant and the overhaul works were carried out based on the quotations, invoices and purchase orders and what was agreed between the parties as minuted during their meetings. The plaintiff claimed that the parties had agreed upon the total costs for the spare parts for the main engine and generators and the costs of labour at the meetings. The plaintiff also claimed that it had agreed to give a warranty for the workmanship for the overhaul works at 500 running hours or six months, whichever was the later ('the warranty'). According to the plaintiff, it had carried out and completed the overhaul works based on the agreement reached between the parties. However, when the defendant failed to pay the costs of the overhaul works of RM349,783.10 carried out on the vessel, the plaintiff filed the present action. The defendant disputed the claim and contended that the overhaul works were not up to acceptable standards. The defendant also claimed that despite its requests to the plaintiff to rectify the substandard works, the latter refused and failed to do the rectification work. The defendant further claimed that it had to engage Scott and English Malaysia Sdn Bhd ('SEM') to rectify and complete the substandard and incomplete works previously carried out by the plaintiff thereby resulting in loss and expenses to the defendant.The defendant thus filed a counterclaim of RM2,745,780 against the plaintiff, being the costs incurred to rectify the substandard work and for losses incurred because the vessel was off hire for 70 days.

Held, allowing the claim with costs to be taxed and dismissing the counterclaim:

(1) It was not in dispute that during the overhaul works a representative of

the defendant was present to approve and check the spare parts used and the overhaul works being carried out. Further, the evidence showed that during a meeting held to resolve the non-payment of the balance due and owing to the plaintiff, the defendant had agreed to pay the outstanding charges by instalments without complaining about the defective works or the use of the non-genuine parts. Since there was no complaint by the defendant on the invoices billed or any defective works or non-genuine parts or any delays in completing the overhaul works at the material times, the defendant should not be allowed to make these complaints subsequently (see paras 18–19).

(2) Although the defendant had adduced evidence that it had sent the vessel to SEM and that the latter had carried out an inspection and sea trial of the vessel, it had not presented any evidence to establish that the problems or defects discovered by SEM were within the scope of works of the overhaul or were due to the poor workmanship of the plaintiff. Further, notwithstanding the problems it had encountered with the vessel, the defendant had not stopped payment of the instalments as agreed between the plaintiff and the defendant. In any case, even if the defects referred to in the report by SEM were due to the poor workmanship of the plaintiff in carrying out the overhaul, the warranty had expired when the defendant encountered the above problems and sent the vessel to SEM for checking and remedial works. The defendant had not proven its claim against the plaintiff (see paras 14–16).

(3) The defendant had not established that the problems or defects encountered by the vessel were due to the sub-standard work of the plaintiff. It had also not proven that the losses it had incurred due to the off hire of the vessel were due to the sub-standard work of the plaintiff and were reasonably foreseeable (see para 20).

[Bahasa Malaysia summary

Pemilik kapal Borneo MV1 ('defendan') telah melantik plaintif untuk menjalankan kerja-kerja baikpulih tertentu di atas kapal. Tidak terdapat sebarang kontrak bertulis yang dimeterai antara plaintif dan defendan dan kerja-kerja membaik pulih telah dijalankan berdasarkan sebut harga, invois dan pesanan belian dan apa yang telah dipersetujui antara pihak-pihak seperti yang termaktub dalam minit mesyuarat mereka. Plaintif mendakwa bahawa pihak-pihak telah bersetuju dengan jumlah kos untuk alat ganti enjin utama dan penjana serta kos buruh ketika mesyuarat. Plaintif juga mendakwa bahawa ia telah bersetuju untuk memberi jaminan bagi mutu kerja bagi kerja-kerja pembaikpulihan selama 500 jam atau enam bulan, yang mana adalah lebih terkemudian ('jaminan tersebut'). Menurut plaintif, ia telah menjalankan dan menyiapkan kerja-kerja pembaikpulihan berdasarkan perjanjian yang dicapai antara pihak-pihak. Walau bagaimanapun, apabila defendan gagal membayar kos kerja-kerja pembaikpulihan yang dijalankan di atas kapal berjumlah

RM349,783.10, plaintif memfailkan tindakan ini. Defendan mempertikaikan tuntutan tersebut dan menegaskan bahawa kerja-kerja baikpulih tidak mencapai piawaian standard. Defendan juga mendakwa bahawa walaupun permintaannya agar plaintif memperbaiki kerja-kerja substandard, plaintif enggan dan gagal untuk melakukan kerja-kerja pembaikan. Defendan juga mendakwa bahawa ia terpaksa mengupah Scott dan English Malaysia Sdn Bhd ('SEM') untuk memperbaiki dan menyiapkan kerja-kerja substandard dan yang tidak lengkap yang dahulunya dijalankan oleh plaintif lantas mengakibatkan kerugian dan perbelanjaan kepada defendan. Defendan, dengan itu memfailkan tuntutan balas sebanyak RM2,745.780 terhadap plaintif, iaitu kos yang ditanggung untuk memperbaiki kerja-kerja substandard dan bagi kerugian yang ditanggung kerana kapal tersebut tidak disewakan selama 70 hari.

Diputuskan, membenarkan tuntutan dengan kos untuk ditaksirkan dan menolak tuntutan balas:

(1) Adalah tidak dipertikaikan bahawa semasa kerja-kerja pembaikpulihan, wakil defendan hadir untuk meluluskan dan memeriksa alat-alat ganti yang digunakan dan kerja-kerja pembaikpulihan yang sedang dijalankan. Di samping itu, bukti-bukti menunjukkan bahawa semasa mesyuarat diadakan untuk menyelesaikan kegagalan pembayaran baki yang perlu dibayar dan terhutang kepada plaintif, defendan telah bersetuju untuk membayar caj tertunggak secara ansuran tanpa mengadu tentang kerja-kerja yang cacat atau penggunaan alat ganti tidak tulen. Oleh kerana tiada aduan oleh defendan pada invois yang dibilkan atau apa-apa kerja yang cacat atau bahagian yang tidak tulen atau sebarang kelewatan dalam menyiapkan kerja-kerja pembaikpulihan pada masa material, defendan tidak harus dibenarkan untuk membuat aduan ini kemudiannya (lihat perenggan 18–19).

(2) Walaupun defendan telah mengemukakan bukti bahawa ia telah menghantar kapal ke SEM dan bahawa plaintif telah menjalankan pemeriksaan dan percubaan laut ke atas kapal tersebut, ia tidak mengemukakan sebarang bukti untuk membuktikan bahawa masalah atau kecacatan yang ditemui oleh SEM berada dalam skop kerja-kerja pembaikpulihan atau disebabkan oleh mutu kerja plaintif yang rendah. Di samping itu, walauapapun masalah yang telah dihadapi dengan kapal, defendan tidak berhenti daripada membuat bayaran ansuran seperti yang dipersetujui antara plaintif dan defendan. Dalam apa jua keadaan, walaupun kecacatan yang dinyatakan dalam laporan oleh SEM disebabkan oleh mutu kerja plaintif yang rendah dalam menjalankan pembaikpulihan, waranti tamat apabila defendan menghadapi masalah tersebut dan seterusnya menghantar kapal ke SEM untuk kerja-kerja pemeriksaan dan pemulihan. Defendan tidak membuktikan tuntutannya terhadap plaintif (lihat perenggan 14–16).

(3) Defendan tidak membuktikan bahawa masalah atau kecacatan yang dihadapi oleh kapal adalah disebabkan oleh kerja-kerja substandard plaintif. Ia juga tidak membuktikan bahawa kerugian yang telah ditanggung olehnya akibat sewa luar kapal adalah disebabkan oleh kerja-kerja substandard plaintif dan boleh dijangka secara munasabah (lihat perenggan 20).]

Notes

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2926–2936.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627; [1994] 3 CLJ 1, SC (refd)

Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)

Mukand Ltd v Malaysia Steel Works (KL) Sdn Bhd [2011] 5 MLJ 578; [2010] 5 CLJ 282, CA (refd)

Tan Sri Khoo Teck Puat & Anor v Plentitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)

Patrick Liaw (Jimmy HT Wee & Co Advocates) for the plaintiff.
Robert Ayu (Jaini Robert & Lau Advocates) for the defendant.

Stephen Chung J:

[1] The plaintiff claimed against the defendant for a sum of RM349,783.10, as at 23 December 2010, being the outstanding charges or costs for the overhaul works carried out on a vessel called the MV Borneo 1, previously known as the MV Rusillah. The particulars of the plaintiff's claim are set out in para 10 of the statement of claim.

[2] The defendant denied the claim and disputed that the works carried out by the plaintiff were duly completed at the end of April 2009. The defendant contended that the overhaul works were not up to standards or the requirements of Cummins, that the replacement parts used were not genuine or were substandard and that some parts were not replaced but bills were issued to the defendant for the price of new parts. The defendant claimed that despite the defendant's requests to the plaintiff to rectify the substandard works, the plaintiff refused and failed to do the rectification works and or to complete the works. The defendant claimed that it had to engage Scott & English (M) Sdn

Bhd ('Scott and English') to rectify and complete the substandard and incomplete works, previously carried out by the plaintiff, resulting in loss and expenses to the defendant.

[3] The defendant has filed a counterclaim of RM2,745,780 against the plaintiff being the costs incurred to rectify the substandard works and for losses incurred because the vessel was off hire for 70 days.

[4] PW1 testified that in October 2008 the defendant asked the plaintiff for a quotation for the prices and charges for spare parts and labour in carrying out the main engine and generators overhaul for the MV Borneo 1. PW1 said that the plaintiff as requested did provide the defendant with the quotations (exhs P1, P2 and P3).

[5] PW1 said that the representatives from Sarawak Slipway Sdn Bhd, where the MV Borneo 1 was to be dry-docked, from the plaintiff and from the defendant had a meeting on 11 December 2008 to discuss the time and costs for the dry docking and overhaul works to be carried out (see exh P5). At the meeting, the costs for labour were agreed at RM129,272, the costs for spare parts for the main engine were RM180,727.50 and the costs for spare parts for the generators were RM45,752, subject to confirmation.

[6] PW1 said that the plaintiff and the defendant agreed that the total costs for the spare parts for the main engine and generators, after discount, would be RM215,155.52. He said that the defendant agreed to pay RM107,577.76 as a 50% down payment of the costs to the plaintiff and to pay the other 50% after completion of the overhaul works by monthly installments. At the meeting, the plaintiff agreed to give a warranty for the workmanship for the overhaul works at 500 running hours or six months, whichever was the later.

[7] The evidence showed that on 16 February 2009 the MV Borneo was sent for the dry docking at Sarawak Slipway Sdn Bhd. After dry docking, and upon dismantling and inspection, the plaintiff provided the defendant with a list of STS spare parts which were required for the overhaul (exh P6) and the spare parts for the generators (exh P7). The defendant by a letter dated 22 January 2009 (exhs P8–P9) confirmed the costs of those spare parts at RM228,618.83 and agreed to pay RM110,000 as the down-payment (exhs P10A–P10B). The defendant issued a purchase order No 023/09 dated 6 March 2009 (exh P13) agreeing to the supply of the amended STS spare parts. After deducting 5% for discount, the costs were RM178,072.18.

[8] PW1 said that upon the above confirmation, the overhaul works were carried out by the plaintiff and were duly completed at the end of April 2009. The plaintiff also successfully carried out the sea trials of the vessel. The

evidence showed that on 12 May 2009, the plaintiff wrote a letter to the defendant to confirm the completion of the overhaul works and asked for payments of the balance due (exh P14A). The plaintiff had sent the invoices for the works and parts to the defendant (see exhs P16, P19–P20, P22, P24, P28, P32, P35, P45, P47–P48, P51, P54, P58, P62, P66 and P69).

[9] In this case, there was no written contract or agreement entered into between the plaintiff and the defendant. The overhaul works were carried out based on the quotations, invoices and purchase orders and on what were agreed between the parties as minuted during their meetings. At the material times there was no complaint by the defendant on the invoices billed or on any defective works or non-genuine parts or any delays in completing the overhaul works. These were the invoices set out and pleaded in para 10 of the statement of claim. PW1 said that there was no payment made by the defendant despite several requests by the plaintiff.

[10] The evidence showed that on 1 October 2009, a meeting was held between the parties in the defendant's office to try to settle the payments. At the meeting, after negotiation, the plaintiff agreed to accept payments from the defendant by post-dated cheques. The minutes showed that the defendant agreed to pay the outstanding sum of RM544,000 by (a) six instalments of RM40,000 each, (b) three instalments of RM75,000 each and (c) a final instalment of RM79,000 (see exh P15). Exhibits P106, P109, P111, P114, P116, P118 and P120 showed that the defendant had made the six instalment payments of RM40,000 each to the plaintiff, commencing from 28 October 2009 to 29 March 2010.

[11] Subsequently the defendant contended that it refused to pay the balance of the amount outstanding after it was discovered that the overhaul works were not carried out in accordance to the standards as stated above. The defendant also contended that the plaintiff had delayed in completing the overhaul works.

[12] The evidence showed that in December 2009, the MV Borneo 1 was unable to achieve her maximum speed of 24 knots. The defendant sent the vessel to Scott and English which carried out a sea trial on 15 December 2009. Scott and English prepared a report dated 11 February 2010 after the inspection and sea trial stating that the STBD side main engine turbo charger and exhaust outlet connection achieved excessive temperature and had turned into 'red hot' colour when the STBD main engine was running at 1200 RPM (see exh P124).

[13] Scott and English recommended replacing the aftercooler core as the short term solution. It advised (at p 117 of BOD6) as long term solutions the following:

(1) Exhaust Gas leak problem must be rectified (Exhaust manifold, exhaust collector and all relevant components).

(2) Exhaust Manifold must be covered properly in order to decrease the heat transfer in the Engine Room as heat temperature will affects engine performance.

(3) Alignment must be made in order to comply to Cummins installation specification and thus ensure engine life.

(4) Replace the air cleaner system (heavy duty type) which is available at Cummins.

(5) All the leaking problem (Lube Oil) must be solved.

(6) Further inspection on the engine internal system have to be carried out in order to further confirm the internal system are working under normal condition.

[14] The questions are whether the above defects were within the scope of works carried out during the overhaul by the plaintiff and whether they were due to the poor workmanship of the plaintiff. The scope of works for the overhaul were described and set out in the description of works (exh P46). Works relating to the dry-docking of the vessel were carried out by Sarawak Slipway Sdn Bhd. Although the description of works included cleaning and checking for defects of the air-cooler, exhaust manifold and heat exchanger, there was no evidence presented by the defendant and there was nothing in the Scott and English report to establish that the problems or defects discovered and set out in the report were within the scope of works of the overhaul and or were due to the poor workmanship of the plaintiff.

[15] In fact, the MV Borneo 1 was surveyed under the American Bureau Shipping ('ABS') classification on 21 July 2009 ie after completion of the overhaul. The ABS survey report (exh P125) stated that 'at completion of overhaul, the engines were operationally tested onboard and all found satisfactory'. The evidence also showed that, notwithstanding the problems encountered in December 2009 and the sea-trial and report by Scott and English, the defendant did not stop payment of the post-dated cheques of RM40,000 each on 28 December 2009, 29 January 2010, 2 March 2010 and 29 March 2010.

[16] Even assuming that the defects referred to in the Scott and English report were due to the poor workmanship of the plaintiff in carrying out the overhaul, the overhaul works were carried out subject to the warranty of 500 running hours or six months as agreed and minuted in P5. It was not in dispute that the warranty had expired when the defendant encountered the above problems in December 2009 and sent the vessel to Scott and English for the checking and remedial works.

[17] Scott and English in its report (P124) had stated that the reason for the

excessive exhaust temperature was due to insufficient heat being removed because the aftercooler core installed on the STBD main engine was non-genuine part. The plaintiff did not deny installing the non-genuine aftercooler. It was the plaintiffs case that it was installed with the knowledge and consent of the defendant because the genuine parts were not available at the material times and due to time constraint the defendant agreed to use the non-genuine parts (see exh P74). The evidence showed that the price charged to the defendant was for non-genuine part.

[18] It was also not in dispute that during the overhaul works, Encik Runnie, a representative of the defendant, was present to check and approve the spare parts used and overhaul works being carried out. There was no complaint by the defendant that the works were not properly carried out in February to April 2009 or upon completion of the overhaul. Encik Runnie was not called by either party to testify on the defective works or that he had made any such complaints.

[19] The evidence showed that during the meeting held on 1 October 2009 to resolve the non-payment of the balance due and owing to the plaintiff, ie about five months after the completion of the overhaul works, there was no complaint by the defendant and none was recorded in the minutes (exh P15) about the defective works or the use of the non-genuine parts. Therefore the defendant should not be allowed to make these complaints subsequently: *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, *Mukand Ltd v Malaysia Steel Works (KL) Sdn Bhd* [2011] 5 MLJ 578; [2010] 5 CLJ 282.

[20] As stated above, the defendant had not established that the problem or defects encountered by the vessel in December 2009 were due to the substandard or poor workmanship of the plaintiff. The defendant had also not established that the losses incurred due to the off hire of the vessel were due to the substandard or poor workmanship of the plaintiff and were reasonably foreseeable or within the contemplation of the parties: see *Tan Sri Khoo Teck Puat & Anor v Plentitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15, *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569.

[21] The defendant referred to exh D2 which was an invoice from Scott and English in support of the defendant's claim of RM1,625,780.70. This invoice did not list out or particularise the works done or the parts supplied. The defendant also did not exhibit any receipt or showed that it had paid this sum to Scott and English. DW2 on the other hand had referred to a debit note at p 134 of BOD6 in his witness statement which he said was paid to Scott and English. This debit note was not tendered as exhibit. In any event, it showed

that a sum of RM71,278.20 was charged for works done. If what DW2 said was correct, it would contradict the invoice of RM1,625,780.70. The defendant has not proved its claim against the plaintiff: see *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1.

[22] From the evidence presented before the court, the plaintiff had established its case against the defendant on a balance of probabilities. Judgment is entered for the plaintiff in the sum of RM349,783.10 against the defendant with interest at 4%pa from the date of the writ till full settlement. The defendant's counterclaim is dismissed. Costs to the plaintiff to be taxed.

Claim allowed with costs to be taxed and counterclaim dismissed.

Reported by Kohila Nesan